



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0343; FRL-9739-3]

Approval and Promulgation of Implementation Plans; Alabama; Disapproval of 110(a)(2)(E)(ii) Infrastructure Requirement for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove a portion of the State Implementation Plan (SIP) submissions, submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), on July 25, 2008, and September 23, 2009, which were intended to meet the requirement of the Clean Air Act (CAA or the Act). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP.

Alabama certified that the Alabama SIP contains provisions that ensure the 1997 annual and 2006 24-hour fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS) are implemented, enforced and maintained in the State. Specifically, EPA is disapproving the State’s submissions that requires the State to comply with the CAA. EPA is taking a separate action to address the other applicable infrastructure elements for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS.

DATES: This rule will be effective [insert 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0343. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9043. Mr. Lakeman can be reached via electronic mail at lakeman.sean@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background**
- II. EPA's Response to Comments**
- III. Final Action**
- IV. Statutory and Executive Order Reviews**

I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to make a SIP submission to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS. On July 18, 1997 (62 FR 36852), EPA promulgated a new annual PM_{2.5} NAAQS and on October 17, 2006 (71 FR 61144), EPA promulgated a new 24-hour NAAQS. On July 20, 2012, EPA proposed to disapprove Alabama's July 25, 2008, and September 23, 2009, infrastructure submissions related to the requirements respecting state boards for the for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. *See* 77 FR 42682. A summary of the background for today's final action is provided below. *See* EPA's July 20, 2012, proposed rulemaking at 77 FR 42682 for more detail.

Section 110(a) of the CAA requires states to submit SIPs to provide for the

implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 annual and 2006 24-hour PM_{2.5} NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous PM NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. Among the elements that states must address is section 110(a)(2)(E)(ii), which in turn refers to the specific requirements of section 128. Section 128 explicitly provides that state SIPs “shall contain requirements” as described in sections 128(a)(1) and (2). In addition, states may adopt any additional requirements that are “more stringent” than those explicitly required in section 128. EPA issued guidance to states making recommendations concerning compliance with section 128.¹

In this action, EPA is only addressing sub-element 110(a)(2)(E)(ii). In taking final action on the proposed disapproval, EPA is responding to an adverse comment received on EPA's July 20, 2012, proposed disapproval of Alabama's July 25, 2008, and September 23,

¹ See “Guidance to States for Meeting Conflict of Interest Requirements of section 128” from David O. Bickert, Deputy General Counsel, to Regional Air Directors, dated March 2, 1978.

2009, infrastructure submissions for sub-element 110(a)(2)(E)(ii). EPA is taking a separate action to address the other applicable infrastructure elements for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. *See, e.g.,* 77 FR 34288.

II. EPA's Response to Comments

The following is EPA's response to the adverse comment received on EPA's July 20, 2012, proposed disapproval of Alabama's July 25, 2008, and September 23, 2009, infrastructure submissions as they relate to section 110(a)(2)(E)(ii) of the CAA.

Comment: On August 20, 2012, ADEM commented on EPA's proposed action and requested that EPA withdraw its proposed disapproval of section 110(a)(2)(E)(ii). ADEM suggested in their comment that EPA approve a conflict of interest protocol submitted for inclusion in the SIP in connection with the State's 2008 ozone NAAQS infrastructure submission. ADEM submitted this conflict of interest protocol as an attachment to its adverse comment on the proposal action. ADEM asserted that with the inclusion of this protocol in the SIP, EPA would be able to approve Alabama's 1997 annual and 2006 24-hour PM_{2.5} infrastructure SIP for sub-element 110(a)(2)(E)(ii).

Response: Section 110(a)(2)(E)(ii) requires that each implementation plan provide that states comply with the requirements respecting state boards pursuant to section 128 of the Act. Section 128 requires that: 1) the majority of members of the state board or body which approves permits or enforcement orders represent the public interest and do not derive any significant portion of

their income from persons subject to permitting or enforcement orders under the CAA; and 2) any potential conflicts of interest by such board or body, or the head of an executive agency with similar powers be adequately disclosed.

In its July 20, 2012, proposed rulemaking (77 FR 42682), EPA preliminarily determined that the State's implementation plan did not contain provisions to comply with section 128 of the Act, and thus, Alabama's July 25, 2008, and September 23, 2009, submissions do not meet the requirements of the Act with respect to section 110(a)(2)(E)(ii).² Alabama's comment on that proposal, which contends that EPA should not finalize the proposed disapproval based upon a conflict of interest disclosure protocol included with the comment for incorporation into the SIP, does not address the underlying basis for the proposed disapproval of element 110(a)(2)(E)(ii). The basis for EPA's disapproval, as discussed in the proposed rule for today's action, is that the

SIP presently fails to include any requirements to address the applicable requirements of section 128 of the CAA.

EPA considered the State's comment and has determined the comments do not adequately address the requirements for the following procedural and substantive reasons. With respect to procedural issues, an adverse comment letter on a proposed action does not meet the statutory and regulatory requirements for a SIP submission. Section 110(a)(1), section 110(a)(2), and section 110(l), all provide that a state's implementation plan submission must undergo

² Prior to EPA's proposed disapproval for this sub-element, ADEM and EPA engaged in a numerous communications regarding this infrastructure SIP deficiency (*see, e.g.*, EPA's comment to ADEM's proposed SIP submittal addressing infrastructure requirements for the 2008 ozone NAAQS which was attached to ADEM's adverse comment and is available in the docket for today's action.)

reasonable notice and opportunity for comment. In addition, EPA regulations at Part 51, Appendix V, set forth additional criteria for a SIP submission. EPA has determined that the conflict of interest disclosure protocol attached to the State's adverse comment letter does not constitute such a SIP submission for a number of reasons including, but not limited to, the fact that the State has not provided information that the submission has undergone the requisite public notice or a demonstration that the protocol has been adopted and is in final form as submitted. In addition, the protocol was not signed, stamped and dated by an appropriate official to indicate that it is fully enforceable by the State.

Substantively, were it an official submission, it would not be sufficient to satisfy the requirements of section 128 necessary for EPA to approve Alabama's infrastructure submissions as they relate to section 110(a)(2)(E)(ii). As noted in the proposed rule for today's action, section 128 requires that: (1) the majority of members of the state board or body which approves permits or enforcement orders represent the public interest and do not derive any significant portion of their income from persons subject to permitting or enforcement orders under the CAA; and (2) any potential conflicts of interest by such board or body, or the head of an executive agency with similar powers be adequately disclosed.

Alabama provides no explanation as to how its conflict of interest disclosure protocol would satisfy the public interest and significant portion of income requirements applicable to the majority of a state board or body subject to section 128(a)(1). Alabama's response to EPA's comments on the State's draft 2008 8-hour ozone infrastructure submission (included with Alabama's comment on today's rulemaking) notes that certain ADEM officials are charged with responsibilities for issuing permits or enforcement orders. EPA has interpreted the "board or body" requirements of section 128(a)(1) as not applying to individuals tasked with authority to

approve permits or enforcement orders. However, where appeals of such permits or enforcement orders are resolved by boards or bodies, those entities are subject to the majority requirements of section 128(a)(1). Alabama's comment does not describe how appeals of permits or enforcement order are handled in the State. In order for EPA to determine that the requirements of section 128(a)(1) are not applicable in Alabama, the State must provide this information. If a board or body does review appeals of permit or enforcement orders, the SIP must require that such board or board be subject to the 128(a)(1) majority requirements in order for EPA to approve Alabama's section 110(a)(2)(E)(ii) infrastructure submittals. Based upon the information protocol described by Alabama, the State's approach fails to address the majority requirements of section 128.

In addition to the issues noted above regarding the section 128(a)(1) requirements, the question of whether a board or body handles appeals of permits or enforcement orders is also relevant to sufficiency of the State's protocol with respect to the section 128(a)(2) requirements. To the extent a board or body decides appeals of permits or enforcement orders, the SIP must require that members of such board or body be subject to the section 128(a)(2) conflict of interest disclosure requirements. The State's conflict of interest disclosure protocol, as submitted, would appear to only apply to three specified officials within ADEM. Alabama has failed to demonstrate how the submitted protocol would provide adequate disclosure consistent with the requirements section 128(a)(2).

EPA also notes that Alabama's conflict of interest disclosure protocol, at footnote 3, asserts that "EPA defines 'significant portion of income' as 50% or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement. This information need only be provided if the

recipient falls in this category.” This statement is incomplete. The complete suggested definition for “Significant Portion of Income” recommended in EPA’s 1978 Guidance to States for Meeting Conflict of Interest Requirements of Section 128 is “10 percent or more of gross personal income for a calendar year, including retirement benefits, consultation fees, and stock dividends, except that it shall mean 50 percent [or more] of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement.” Alabama’s protocol omits the generally applicable 10 percent standard.³

EPA is finalizing disapproval of Alabama’s infrastructure submissions as they relate to sub-element 110(a)(2)(E)(ii) because, as described above, the SIP presently does not contain provisions to address the requirements of section 128 of the CAA. Consistent with the obligations under the CAA, EPA intends to continue working with the State to resolve this SIP deficiency.

III. Final Action

EPA is taking final action to disapprove the portion of Alabama’s July 25, 2008, and September 23, 2009, submissions which was intended to meet the requirement to address element 110(a)(2)(E)(ii) for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. EPA has made the determination that Alabama’s SIP does not satisfy the requirement for element 110(a)(2)(E)(ii) for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. In today's action, EPA is

³ EPA notes that this suggested definition is provided in a guidance document as an example to states of how to define significant portions of income, therefore, states may propose a different standard as constituting a “significant portion of income.” However, as noted in the guidance, EPA views the substance of the suggested definitions as representing the minimum level of stringency necessary to meet the requirements of section 128.

not taking any action on the remaining elements of the submission, including other section 110(a)(2) infrastructure elements.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C. sections 7501-7515) or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP call) starts a sanctions clock. Section 110(a)(2)(E)(ii) provisions (the provisions being disapproved in today's notice) were not submitted to meet requirements for Part D, and therefore, no sanctions will be triggered. This final action triggers the requirement under section 110(c) that EPA promulgate a Federal Implementation Plan (FIP) no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly this final action disapproves state law because it does not meet federal requirements. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 27, 2012

A. Stanley Meiburg

Acting Regional Administrator,
Region 4.

40 CFR part 52 is amended as follows:

PART 52- Approval and Promulgation of Implementation Plans

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart B—Alabama

2. Section 52.62 is amended by adding paragraph (e), to read as follows:

§ 52.62 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(e) Disapproval. EPA is disapproving portions of Alabama's Infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS addressing section 110(a)(2)(E)(ii) that requires the State to comply with section 128 of the CAA.

[FR Doc. 2012-25149 Filed 10/12/2012 at 8:45 am; Publication Date: 10/15/2012]